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| RICKY NOLAN, |) | |
| |) | |
| Petitioner, |) | 3: 09-cv-0188-RCJ-RAM |
| |) | |
| vs. |) | |
| |) | ORDER |
| JACK PALMER, <i>et al.</i> , |) | |
| |) | |
| Respondents. |) | |

PROCEDURAL HISTORY

On October 23, 2002, the state filed a criminal complaint against petitioner charging him with 18 counts including the following: 1) one count of first degree kidnaping and one count of sexual assault perpetrated on Cynthia Edens; and 2) one count of first degree kidnaping; six counts of sexual assault with substantial bodily harm; four counts of burglary; two counts of attempt unauthorized signing of a credit card or debit card transaction document; two counts of unauthorized signing of a credit or debit card transaction document; and one count of robbery, all perpetrated on Lynda Weishaar. Index, Exhibit 1.

1 On November 6, 2002, the stated filed an amended criminal complaint which contained 24 counts
2 and corrected the name Cynthia Edens to Cynthia Dyson. The six new counts consisted of three more
3 sexual assault charges and one robbery charge perpetrated upon Cynthia Dyson. Index, Exhibit 2. It also
4 included an attempt murder with use of a deadly weapon charge and a battery with use of a deadly
5 weapon charge, both perpetrated against Lawrence Dyson. *Id.*

6 On November 6, 2002, and November 7, 2002, the justice court conducted a preliminary hearing.
7 Index, Exhibits 3 and 4. At the conclusion of the preliminary hearing, the judge bound petitioner over
8 on all charges. Index, Exhibits 4 and 5.

9 On November 19, 2002, the state filed an information containing the above 24 counts. Index,
10 Exhibit 7. On November 25, 2002, the court amended the information to add a notice of intent to seek
11 habitual criminal punishment, petitioner entered a plea of not guilty, and trial was set for March 17,
12 2003. Index, Exhibits 8 and 9. On May 7, 2003, the court granted petitioner's motion to sever the
13 Dyson counts (counts 1-8) into a separate trial. Index, Exhibit 13.

14 On July 23, 2003, the state public defender filed a motion to withdraw due to conflict of interest;
15 the court granted the motion and appointed Mr. Goodman to represent petitioner. Index, Exhibits 14,
16 15, 16, and 17. On September 22, 2003, the court continued the trial on the Weishaar counts (Trial 1)
17 to January 12, 2004, and the trial on the Dyson counts (Trial 2) to March 15, 2004. Index, Exhibit 20.

18 On January 12, 2004, the state filed a second amended information which corrected two dates
19 and renumbered the Weishaar counts 1 through 16. Index, Exhibit 21. The trial began on January 12,
20 2004. Index, Exhibits 22 - 25. The jury found petitioner guilty on 13 counts and not guilty on 3 counts.
21 Index, Exhibits 26 and 27. On March 8, 2004, the court sentenced petitioner as follows: count 1 – life
22 with the possibility of parole after 5 years; counts 4 and 6 – life without the possibility of parole and a
23 special sentence of lifetime supervision, to run concurrently with each other but consecutively to count
24 1; count 3 – life with the possibility of parole after 10 years and a special sentence of lifetime supervision,
25 to run consecutively to counts 1, 4 and 6. The remaining sentences run concurrently with each other and
26 consecutively to counts 1, 4 and 6, as follows: counts 9, 11, 13, 15, and 16 - - 22 to 96 months; counts

1 10, 12 and 14 - - 12 to 36 months; and count 8 - - 35 to 156 months. Exhibits 28 and 30. The court
2 entered its judgment of conviction on March 12, 2004. Index, Exhibit 30.

3 The trial on the Dyson counts (Trial 2) began on March 15, 2004. Exhibits 31 to 35. The jury
4 found petitioner guilty on seven counts and not guilty on 1 count. *Id.* On May 10, 2004, the court
5 sentenced petitioner as follows: count 1 - - life with the possibility of parole after five years, to run
6 consecutively to the Weishaar sentences; counts 2, 3, 4, and 5 - - life with the possibility of parole after
7 10 years, to run concurrently with each other but consecutively to count 1; count 7 – 96 to 240 months
8 plus and equal and consecutive 96 to 240 months to run concurrently with count 8 but consecutively to
9 counts 2, 3, 4, and 5; count 8 - 72 to 180 months to run concurrently with count 7 but consecutively to
10 counts 2, 3, 4, and 5. Index, Exhibits 37 and 38. On June 8, 2004, the court entered its judgment of
11 conviction. Index, Exhibit 38.

12 Petitioner filed direct appeals from both judgments of conviction and the Nevada Supreme Court
13 consolidated the two appeals. On April 5, 2005, the Nevada Supreme Court entered its order affirming
14 in part, reversing in part and remanding. The court affirmed all the convictions except the Dyson battery
15 with use of a deadly weapon with substantial bodily harm conviction. Index, Exhibit 44.

16 On December 4, 2006, petitioner filed his first state postconviction petition for writ of habeas
17 corpus, which contained 76 grounds stemming from the Weishaar trial. Index, Exhibit 46. On March
18 5, 2007, petitioner filed his second state postconviction petition for writ of habeas corpus which
19 contained 61 grounds stemming from the Dyson trial. Index, Exhibit 50. On April 4, 2007, petitioner
20 filed a supplement containing one ground, ground 62. Index, Exhibit 51.

21 On August 13, 2007, pursuant to the Nevada Supreme Court's order on petitioner's direct appeal,
22 the state filed separate amended judgments of conviction for the Weishaar and Dyson trials. The
23 amended judgment in the Dyson trial omitted the battery with a deadly weapon with substantial bodily
24 harm conviction. Index, Exhibits 57 and 58. Although petitioner appealed from the amended judgments,
25 the Nevada Supreme Court found a jurisdictional defect. Index, Exhibit 66. It found that the amended
26 judgments did not add any additional counts, and that petitioner was thus not an aggrieved party. *Id.*

1 It therefore dismissed the appeal *Id.*

2 On August 22, 2007, petitioner filed a third postconviction petition for writ of habeas corpus, this
3 time challenging the amendments of the judgments of conviction. Index, 67. The district court denied
4 all three of petitioner's petitions for writ of habeas corpus and petitioner appealed. On March 24, 2009,
5 the Nevada Supreme Court entered its order of affirmance and limited remand to correct the amended
6 judgment of conviction. Index, Exhibit 74. The court concluded that petitioner was not entitled to
7 relief, but remanded the judgment in the Dyson case for correction of a clerical error. *Id.*

8 The court received the original petition in this action on April 10, 2009. On June 18, 2009, the
9 court entered an order which provided in part as follows:

10 Petitioner has also filed a habeas corpus petition in case #:09-cv-0218-BES-VPC
11 that is challenging the same conviction in state criminal case no. C-188025. Although the
12 two petitions appear to state different grounds for relief, they both challenge the same
13 state convictions and Nevada Supreme Court orders. The Court will consolidate the two
14 actions, will dismiss petitioner's action in 3:09-cv-0218-BES-VPC, and will give the
15 petitioner an opportunity to file an amended petition in 3:09-cv-0188-BES-RAM setting
16 forth all of this grounds for habeas relief challenging conviction C-188025. The court
17 notes that petitioner should not merely attach documents previously filed but should list
18 each claim for relief, and state facts to indicate clearly why he believes he is in custody in
19 violation of the constitution, laws, or treaties of the United States. Petitioner must do his
20 best to organize and state his claims, such that they are understandable to the court and
21 to respondents.

22 The Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254
23 Cases in the United States District Courts instruct that "notice pleading" is not sufficient
24 in a habeas corpus action. The petition is expected to state *facts* that point to a real
25 possibility of constitutional error. Advisory Committee Note to Rule 4, Rules Governing
26 Section 2254 Cases, *citing Aubut v. State of Maine*, 431 F.2d 688, 689 (1st. Cir. 1970),
cited in Blackledge v. Allison, 431 U.S. 63, 75 n. 7 (1977). In fact, a petition for writ of
habeas corpus may be dismissed summarily if the allegations in it are vague or conclusory.
Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

21 Docket 7, p. 2-3. Petitioner filed his amended petition on July 15, 2009. (Docket #14.) Respondents
22 filed their motion to dismiss on October 26, 2009. (Docket #25.) Petitioner filed his opposition to
23 respondents' motion on November 12, 2009. (Docket #34.)

24 LEGAL STANDARDS

25 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996
26 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. *Lindh v.*

1 *Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997);
 2 *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769
 3 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other grounds by Lindh*
 4 *v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable to cases filed after
 5 statute's enactment). The instant petition was filed after the enactment of the AEDPA, thus it is governed
 6 by its provisions.

7 This court may entertain a petition for writ of habeas corpus “in behalf of a person in custody
 8 pursuant to the judgment of a State court only on the ground that he is in custody in violation of the
 9 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

10 The AEDPA altered the standard of review that a federal habeas court must apply with respect
 11 to a state prisoner's claim that was adjudicated on the merits in state court. *Williams v. Taylor*, 120 S.Ct.
 12 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will not be granted unless
 13 the adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable
 14 application of, clearly established Federal law, as determined by the Supreme Court of the United States;”
 15 or “resulted in a decision that was based on an unreasonable determination of the facts in light of the
 16 evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 123 S.Ct.
 17 1166, 1173 (2003) (disapproving of the Ninth Circuit’s approach in *Van Tran v. Lindsey*, 212 F.3d 1143
 18 (9th Cir. 2000)); *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). “A federal habeas court may not issue
 19 the writ simply because that court concludes in its independent judgment that the relevant state-court
 20 decision applied clearly established federal law erroneously or incorrectly.” *Lockyer*, at 1174 (citations
 21 omitted). “Rather, that application must be objectively unreasonable.” *Id.* (citations omitted).

22 While habeas corpus relief is an important instrument to assure that individuals are constitutionally
 23 protected, *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983); *Harris v. Nelson*,
 24 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal conviction is the primary
 25 method for a petitioner to challenge that conviction. *Brecht v. Abrahamson*, 507 U.S. 619, 633, 113
 26 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual determinations must be presumed correct,

1 and the federal court must accept all factual findings made by the state court unless the petitioner can
 2 rebut “the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1);
 3 *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769 (1995); *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct.
 4 457 (1995); *Langford v. Day*, 110 F.3d 1380, 1388 (9th Cir. 1997).

5 DISCUSSION

6 **I. Grounds 10, 12, 13, 14, 15, 16, 17, 23, 24, 26, 31, 36, 37, 38, 39, 41, 43, 45, 46, 47, 48, 49, 50,** 7 **51, 52, 53(c), 54, 57, 59, 62, 66, 67, 68, 70, 72, 78, 81, 82, 94, and 98**

8 Respondents move to dismiss these 40 grounds for relief, contending that they fail to present any
 9 sufficiently specific claims warranting federal habeas relief. Respondents discuss and analyze each of
 10 these grounds for relief separately. This court has carefully reviewed respondents’ arguments and the
 11 40 grounds for relief, as stated in petitioner’s amended petition. The court must agree with respondents
 12 that as to each of these grounds for relief, petitioner fails to allege specific facts which would support
 13 habeas corpus relief. Although petitioner repeatedly incorporates pages of state court records, he does
 14 not attach the relevant pages to his petition or explain how the records might support his arguments. His
 15 arguments are conclusory, without the necessary detail to demonstrate how the Nevada Supreme Court’s
 16 decision on the issue claim “resulted in a decision that was contrary to, or involved an unreasonable
 17 application of, clearly established Federal law, as determined by the Supreme Court of the United States;”
 18 or “resulted in a decision that was based on an unreasonable determination of the facts in light of the
 19 evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d). Further, attachment of the
 20 decisions of the Nevada District Court and Nevada Supreme Court to the petition are insufficient to
 21 incorporate the issues addressed therein into the present petition. *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005)
 22 (citing Fed. R. Civ. P. 81(a)(2) and 10(c)). Accordingly, these grounds for relief will be dismissed for
 23 failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil
 24 Procedure.

25 **II. Grounds 5, 6, and 59, and Portions of Grounds 1, 4, and 7**

26 Respondents move to dismiss these ground for relief on the ground that they are procedurally

1 barred, based on the doctrine of law of the case. “Procedural default” refers to the situation where a
2 petitioner in fact presented a claim to the state courts but the state courts disposed of the claim on
3 procedural grounds, instead of on the merits. A federal court will not review a claim for habeas corpus
4 relief if the decision of the state court regarding that claim rested on a state law ground that is
5 independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501
6 U.S. 722, 730-31 (1991).

7 The *Coleman* Court stated the effect of a procedural default, as follows:

8 In all cases in which a state prisoner has defaulted his federal claims in
9 state court pursuant to an independent and adequate state procedural rule,
10 federal habeas review of the claims is barred unless the prisoner can
11 demonstrate cause for the default and actual prejudice as a result of the
alleged violation of federal law, or demonstrate that failure to consider the
claims will result in a fundamental miscarriage of justice.

12 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
13 default doctrine ensures that the state’s interest in correcting its own mistakes is respected in all federal
14 habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

15 To demonstrate cause for a procedural default, the petitioner must be able to “show that some
16 *objective factor external to the defense* impeded” his efforts to comply with the state procedural rule.
17 *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have
18 prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

19 With respect to the prejudice prong of cause and prejudice, the petitioner bears:
20 the burden of showing not merely that the errors [complained of]
21 constituted a possibility of prejudice, but that they worked to his actual
and substantial disadvantage, infecting his entire [proceeding] with errors
of constitutional dimension.

22 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170
23 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner suffered
24 actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530
25 n.3 (9th Cir. 1988).

26 ///

1 In addition, a petitioner can avoid the application of the procedural default doctrine by
 2 demonstrating that the federal court's failure to consider his claims will result in a fundamental
 3 miscarriage of justice. To prove a "fundamental miscarriage of justice," petitioner must show that the
 4 constitutional error of which he complains "has probably resulted in the conviction of one who is actually
 5 innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray v. Carrier*, 477 U.S. at
 6 496).

7 In its March 24, 2009 order affirming the district court's denial of petitioner's postconviction
 8 petitions, the Nevada Supreme Court found that the law of the case prevented litigation of the following
 9 claims from the Weishaar case:

10 In his petition, appellant contended that there was insufficient evidence to sustain
 11 his conviction, the district court erred in admitting testimony that had been elicited under
 12 hypnosis, the State and district erroneously introduced a prior statement of the victim, and
 13 a juror improperly questioned a witness. This court considered and rejected these claims
 14 on appeal. The doctrine of law of the case prevents further litigation of these issue and
 15 "cannot be avoided by a more detailed and precisely focused argument." *Hall v. State*,
 16 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in
 17 denying these claims.

18 Index, Exhibit 74, p. 3. In the same order, while addressing the Dyson claims, the Nevada Supreme
 19 Court held as follows:

20 In his petition, appellant claimed that there was insufficient evidence to sustain his
 21 convictions, the State failed to preserve and gather the rock that was allegedly used in the
 22 attack, and the jury instruction for kidnaping was missing. This court considered and
 23 rejected those claims on direct appeal. The doctrine of law of the case prevents further
 24 litigation of these issues and cannot be avoided by a more detailed and precisely focused
 25 argument. *Hall v. State*, 91 Nev. 314, 316, 545 P.2d 797, 799 (1975). Therefore, the
 26 district court did not err in denying these claims.

Index, Exhibit 74, p. 22.

Respondents contend that the doctrine of law of the case is regularly and consistently applied by
 the Nevada state court and is therefore an adequate and independent ground sufficient to support a
 finding of procedural default. This court agrees. *See State v. Eighth Judicial District Court ex re.*
County of Clark, 112 P.3d 1070, 1075 (Nev. 2005); *State v. Haberstroh*, 69 P.3d 676, 686 (Nev. 2003);
McNelson v. State, 990 P.2d 1263, 1275 (Nev. 1999); *Hogan v. Warden, Ely State Prison*, 860 P.2d 710,

///

1 715 (Nev. 1993). Thus, any of petitioner's claims rejected by the Nevada Supreme Court on the ground
2 of law of the case are now procedurally barred.

3 Respondents contend that the equal protection claims in federal grounds 1, 4 and 7, which
4 correspond to direct appeal grounds 1, 2 and 8, respectively, are now procedurally barred based on law
5 of the case. The court finds, however, that there is no mention of equal protection in either petitioner's
6 appellate opening brief or the Nevada Supreme Court's analysis on direct appeal of grounds 1 or 8. The
7 court also finds that there is no mention of equal protection in ground 2 of petitioner's opening appellate
8 brief, and the Nevada Supreme Court's opinion contains no analysis of ground 2. Accordingly, the court
9 finds that the Nevada Supreme Court's opinion affirming the denial of petitioner's postconviction
10 petitions based on law of the case provides no basis for a finding of procedural bar of the equal protection
11 claims federal claims 1, 4 or 7. Respondents also contend that the portion of federal ground 1 based on
12 compulsory process is procedurally defaulted based on the same decision. Again, the Nevada Supreme
13 Court's decision on direct appeal contains no reference to compulsory process regarding claim 1. Thus,
14 the opinion affirming the denial of petitioner's postconviction petitions based on law of the case provides
15 no basis for a finding of procedural bar as to this portion of claim 1. The court will therefore deny
16 respondents' motion to dismiss to the extent that it is based on the contention that the equal protection
17 claims in federal grounds 1, 4 and 7 and the compulsory process claim in ground 1 are procedurally
18 barred based on law of the case.

19 Respondents further contend that federal grounds 5, 6 and 59 are defaulted in their entirety
20 because the corresponding direct appeal claims (4 and 5) raise no allegations of federal constitutional
21 violations. The court agrees that direct appeal claims 4 and 5 raise no constitutional issues. This does
22 not, however, demonstrate that grounds 5, 6 and 59 are procedurally defaulted. It demonstrates that they
23 are unexhausted. It is well established that Nevada courts may excuse procedural bars of untimely or
24 successive filings if a petitioner shows good cause and prejudice, thus a Nevada remedy is still possibly
25 available to petitioner. *See Jones v. McDaniel*, 320 Fed.Appx. 784 (9th Cir. 2000). The court will
26 therefore deny respondents' motion to dismiss to the extent that respondents claim that grounds 5, 6 and

59 are procedurally defaulted.

III. Grounds 2, 28, 19, 20, 21, 22, 23, 24, 27, 29, 33, 34, 39, 40, 41, 46, 47, 48, 49, 51, 52, 53(a), 53(c), 54, 55, 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 70, 71, 72, 76, 78, 79, 81, 82, 83, 84, 85, 86, 87, 89, 90, and 97.

The Weishaar Grounds

In its order affirming the denial of petitioner's postconviction petitions for writ of habeas corpus, the Nevada Supreme Court held in part as follows in regard to grounds for relief challenging the Weishaar conviction:

Appellant also contended that the State committed prosecutorial misconduct, failed to investigate or pursue DNA testing on other suspects, failed to disclose some evidence until the last day of trial, refused to identify the hypnotherapist that conducted hypnosis on Weishaar, improperly presented show-up and voice identifications that were the result of hypnosis, violated the exclusionary rule, violated Brady v. Maryland, 373 U.S. 83 (1963), violated Miranda v. Arizona, 384 U.S. 436 (1966), presented false evidence, tampered with a witness, and improperly argued false hypnosis testimony. He further claimed that the district court erred in failing to instruct the jury on lesser-included offenses, imposing multiple punishments in violation of the Double Jeopardy Clause, admitting unlawfully obtained statements, instructing the jury, precluding videotape evidence, interfering with the defense, tampering with evidence, destroying evidence, permitting evidence to be introduced on the last day of trial, redacting the [sic] Weishaar's hypnotized testimony, permitting the State to introduce written transcripts of appellant's statements to the police, limiting the testimony of a defense witness, interfering with defense counsel's cross-examination, committing judicial misconduct, permitting the jurors to tamper with evidence, permitting a nurse to testify as an expert in toxicology, and permitting the nurse to testify regarding Weishaar's medical records. He also claimed that the district court was biased and the makeup of the jury violated Batson v. Kentucky, 476 U.S. 79 (1986). These claims could have been raised on appellant's direct appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b)(1), (2). Therefore, the district court did not err in denying these claims.

Index, Exhibit 74. p. 3-4.

Based on this language, respondents now move to dismiss several federal grounds for relief on the ground that the Nevada Supreme Court found the parallel state claims to be procedurally barred.

Respondents move to dismiss grounds 18, 19, 20, 21, 22, 27, 33, 34, 39, 40, 41, 46, 47, 48, 52, 53(a), and 53(c), all of which allege prosecutorial misconduct. The court agrees with respondents that these grounds for relief are addressed in the portion of the Nevada Supreme Court's language quoted above. Also relying on the above-quoted language, respondents move to dismiss grounds 24 (State failed

1 to investigate or pursue DNA testing on other suspects; 34 (State failed to disclose evidence on the last
 2 day of trial); 19 (state refused to identify the hypnotherapist); ground 20 (improper show-up and voice
 3 identifications under hypnosis); ground 47 (exclusionary rule violations); grounds 19, 22, and 23 (*Brady*
 4 violations); grounds 18 and 46 (*Miranda* violations); grounds 21, 22 and 53 (presentation of false
 5 evidence); grounds 21 and 22 (argument of false hypnosis testimony); grounds 27, 29, 46, 47, 49, 51 and
 6 52 (judicial misconduct); ground 46 (trial court erred in admitting unlawfully obtained statements and
 7 tampered with evidence); The court again agrees that each of grounds are addressed in the Nevada
 8 Supreme Court's opinion quoted above.

9 Respondents move to dismiss federal ground 2, in which petitioner claims that the Nevada
 10 Supreme Court erred in deciding his direct appeal using harmless error analysis. The Nevada Supreme
 11 Court found that this claim was procedurally barred for petitioner's failure to raise it on direct appeal,
 12 citing 34.810(1)(b)(3). Index, Exhibit 74, p. 4 - 5.

13 In affirming the decision of the district court, the Nevada Supreme Court cited NRS
 14 34.810(1)(b)(2). The Ninth Circuit Court of Appeals has held that, at least in non-capital cases,
 15 application of the procedural bar at issue in this case -- NRS 34.810 -- is an independent and adequate
 16 state ground.¹ *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see also Bargas v. Burns*, 179

17
 18 ¹ NRS 34.810 provides in part as follows:

19 1. The court shall dismiss a petition if the court determines that:

20 (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the
 21 petition is not based upon an allegation that the plea was involuntarily or unknowingly
 entered or that the plea was entered without effective assistance of counsel.

22 (b) The petitioner's conviction was the result of a trial and the grounds for the petition
 could have been:

23 (1) Presented to the trial court;

24 (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or
 25 postconviction relief; or

26 (3) Raised in any other proceeding that the petitioner has taken to secure relief from his
 conviction and sentence,

1 F.3d 1207, 1210-12 (9th Cir. 1999). This court therefore finds that these grounds for relief are
2 procedurally barred. The court further finds that petitioner has not demonstrated good cause and
3 prejudice to overcome the bar. Accordingly, respondents' motion to dismiss will be granted as to these
4 grounds for relief.

5 **The Dyson Grounds**

6 In its order affirming the denial of petitioner's postconviction petitions for writ of habeas corpus,
7 the Nevada Supreme Court held in part as follows in regard to grounds for relief challenging the Weishaar
8 conviction:

9 Next, appellant contended that the State committed prosecutorial
10 misconduct, falsely represented facts related to disciplinary actions against a police
11 detective, suborned perjury violated Brady v. Maryland, 373 U.S. 83 (1963), in failing to
12 turn over prior statements of Cynthia Dyson, failed to gather exculpatory evidence, failed
13 to investigate assaults on appellant, tampered with appellant's statements, improperly
14 referred to the internal investigation in its closing, fabricated a story about a witness's
15 availability, created prejudicial photographic evidence, failed to notify the defense of deals
16 with three witnesses, moved to admit fabricated evidence, and tampered with a witness.
17 He also claimed that the district court failed to give several jury instructions, improperly
18 admitted medical reports, improperly permitted the State to create a false impression of
19 the evidence, improperly permitted the State to introduce hearsay evidence, committed
20 misconduct, was biased, made improper comments, gave improper and erroneous jury
21 instructions, permitted a violation of Batson v. Kentucky, 476 U.S. 79 (1986), improperly
22 admitted medical reports through a detective's testimony, erred in admitting certain
23 evidence, erred in permitting appellant's statements to be read into evidence, denied
24 appellant the right to confront a witness, erred in striking appellant's evidence from the
25 record, erred in refusing to grant appellant's motion for a mistrial, and improperly
26 interfered with a defense cross-examination. These claims could have been raised in
appellant's direct appeal, and appellant failed to demonstrate good cause for his failure
to so and actual prejudice. NRS 34.810(1)(b)(1), (2). Therefore, the district court did
not err in denying these claims. [Footnote omitted.]

20 Exhibit 74, p. 22-23.

21 Grounds 55, 64, 66, 67, 71, 78, 79, 82, 83, and 90 of the federal petition all contain claims that
22 the district court committed judicial misconduct. Respondents argue that these claims are procedurally
23 defaulted, based on the above language. Respondents also argue that under the Nevada Supreme Court
24

25 unless the court finds both cause for the failure to present the grounds and actual
26 prejudice to the petitioner.

procedurally defaulted the trial error claims in ground 60 (improperly allowed the State to create a false impression of the evidence), ground 62 (gave improper and erroneous jury instructions), ground 76 (failed to give several jury instructions), ground 97 (gave improper and erroneous jury instructions), and ground 99 (allowed prosecutorial misconduct). Respondents further argue that the Nevada Supreme Court procedurally defaulted the following grounds for relief on the ground that they could have been raised on direct appeal: ground 57 (police misconduct, bad faith); ground 68 (police misconduct, bad faith), ground 70 (trial court biased and committed misconduct); and ground 86 (failure to investigate assaults on petitioner). Again, in affirming the decision of the district court, the Nevada Supreme Court cited, NRS 34.810, which has been held to be an independent and adequate state ground., sufficient to support procedural default. *See Vang*, 329 F.3d at 1073-75. This court therefore finds that these grounds for relief are procedurally barred. The court finds that petitioner has not demonstrated good cause and prejudice to overcome this procedural bar. Therefore the court will grant respondents' motion to dismiss as to these claims.

IV. Motion for Discovery

On March 31, 2010, petitioner filed a motion for leave to conduct discovery in this case. Unlike other civil litigants, a habeas corpus petitioner is not entitled to broad discovery. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 1796-97 (1997); *Harris v. Nelson*, 394 U.S. 286, 295, 89 S.Ct. 1082, 1088-89 (1969). Although discovery is available pursuant to Rule 6, it is only granted at the court's discretion, and upon a showing of good cause. *Bracy*, 117 S.Ct. 1793, 1797; *McDaniel v. United States Dist. Court (Jones)*, 127 F.3d 886, 888 (9th Cir. 1997); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997); Rule 6(a) of the Rules Governing Section 2254. The Advisory Committee Notes to Rule 6 of the Rules Governing Section 2254 Cases emphasize that Rule 6 was not intended to extend to habeas corpus petitioners, as a matter of right, the Federal Rules of Civil Procedure's broad discovery provisions. Rule 6, Advisory Committee Notes (quoting *Harris*, 394 U.S. at 295, 89 S.Ct. at 1089). In the present case, the court finds that petitioner has not shown that if the facts were fully developed on any of the matters on which he seeks discovery, he would be entitled to relief. *See Bracy v. Gramley*,

1 520 U.S. 899, 908-09 (1997). Accordingly, the court concludes that petitioner has not established any
 2 basis for discovery and his motion will be denied.

3 **V. Motion for Stay**

4 On December 11, 2009, petitioner filed a motion for a stay of “any and all claims deemed to be
 5 unexhausted.” (Docket #42.) This court has found grounds 5, 6 and 59 to be unexhausted.

6 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed some limitations
 7 upon the discretion of this court to facilitate habeas petitioners’ return to state court to exhaust claims.

8 The *Rhines* Court stated:

9 [S]tay and abeyance should be available only in limited circumstances.
 10 Because granting a stay effectively excuses a petitioner’s failure to present his
 11 claims first to the state courts, stay and abeyance is only appropriate when the
 12 district court determines there was good cause for the petitioner’s failure to
 13 exhaust his claims first in state court. Moreover, even if a petitioner had good
 14 cause for that failure, the district court would abuse its discretion if it were to
 15 grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28
 16 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be
 17 denied on the merits, notwithstanding the failure of the applicant to exhaust
 18 the remedies available in the courts of the State”).

15 *Rhines*, 544 U.S. at 277.

16 In ground 5, petitioner claims that his rights under the sixth and fourteenth amendments were
 17 violated when a juror in the Weishaar trial asked questions of a witness and followed it with an audible
 18 commentary on the witness’s response. In addressing this factual allegation on direct appeal, the Nevada
 19 Supreme Court found that the trial court had committed plain error in failing to admonish the jury
 20 following the spontaneous outburst by the juror. Index, Exhibit 44, p. 11-12. The court, however, found
 21 that the error was not prejudicial and did not affect petitioner’s substantial rights. *Id.* Petitioner
 22 presents nothing to demonstrate that the Nevada Supreme Court’s ruling “resulted in a decision that was
 23 contrary to, or involved an unreasonable application of, clearly established Federal law, as determined
 24 by the Supreme Court of the United States;” or “resulted in a decision that was based on an unreasonable
 25 determination of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C.
 26 § 2254(d).

1 In grounds 6 and 59, petitioner claims violations of his rights under the sixth and fourteenth
2 amendments, alleging that the trial court used incomplete instructions regarding kidnaping in both trials.
3 Petitioner contends that the instruction given was misleading and confused the jury regarding the
4 movement of the victim needed to support a conviction of both sexual assault and kidnaping. The Nevada
5 Supreme Court addressed this factual allegation in its opinion on direct appeal. Index, Exhibit 44, p. 14-
6 15. The court found that there was no abuse of discretion or judicial error in regard to the jury
7 instructions. *Id.* at 15. Again, petitioner has not met the required showing for relief under 28 U.S.C.
8 § 2254(d).

9 Based on this court's review of petitioner's supporting arguments and the Nevada Supreme
10 Court's analysis of the claims, this court finds grounds 5, 6 and 59 to be plainly meritless. Thus, the court
11 will not grant petitioner a stay to return to state court to exhaust these claims. The court will dismiss
12 these claims as meritless pursuant to 28 U.S.C. § 2254(b)(2).

13 **VI. Motion for Evidentiary Hearing**

14 On August 4, 2010, petitioner filed a motion for an evidentiary hearing in this case. (Docket #50.)
15 Rule 8(a) of the Rules Governing Section 2254 Cases provides that where a petition is not dismissed at
16 a previous stage in the proceeding, the judge, after the answer and transcripts and record of the state
17 court proceedings are filed, shall, *upon review* of those proceedings, determine whether an evidentiary
18 hearing is required. The purpose of an evidentiary hearing is to resolve the merits of a factual dispute.
19 An evidentiary hearing on a claim is required where it is clear from the petition that: (1) the allegations,
20 if established, would entitle the petitioner to relief; and (2) the state court trier of fact has not reliably
21 found the relevant facts. *See, Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir.1992). As the function
22 of an evidentiary hearing is to try issues of fact, *Townsend v. Swain* 372 U.S. 293, 309 (1963)(*overruled*
23 *in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715 (1993)), such a hearing is unnecessary
24 when only issues of law are raised. *Id.*

25 In this case, petitioner seeks an evidentiary hearing to the hypnosis statute, the signing of a "don't
26 prosecute card," and the findings of misconduct by the LVMDP. Petitioner has made no allegations in

1 connection with these matters which, if true, would entitle him to relief. Accordingly, petitioner has
2 demonstrated no basis for an evidentiary hearing and his motion will be denied.

3 **IT IS HEREBY ORDERED** that respondents' motion to dismiss (docket #25) is **GRANTED**
4 as to grounds 10, 12, 13, 14, 15, 16, 17, 23, 24, 26, 31, 36, 37, 38, 39, 41, 43, 45, 46, 47, 48, 49, 50,
5 51, 52, 53(c), 54, 57, 59, 62, 66, 67, 68, 70, 72, 78, 81, 82, 94, and 98. These grounds for relief are
6 **DISMISSED** for failure to state a claim upon which relief can be granted.

7 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #25) is **DENIED**
8 to the extent that it is based on the contention that the equal protection claims in grounds 1, 4 and 7 and
9 the compulsory process claim in ground 1 are procedurally barred based on law of the case.

10 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #25) is **DENIED**
11 to the extent that it is based on the contention that grounds 5, 6 and 59 are procedurally defaulted.

12 **IT IS FURTHER ORDERED** that grounds 5, 6 and 59 are **DISMISSED** as plainly meritless.

13 **IT IS FURTHER ORDERED** the respondents' motion to dismiss (docket #25) is **GRANTED**
14 as to grounds 2, 18, 19, 20, 21, 22, 27, 33, 34, 39, 40, 41, 46, 47, 48, 52, 53(a), and 53(c). These
15 grounds are **DISMISSED** as procedurally barred.

16 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #25) is **GRANTED**
17 as to the following portions of the following grounds for relief: ground 24 (state failed to investigate or
18 pursue DNA testing on other suspects; ground 34 (state failed to disclose evidence on the last day of
19 trial); 19 (state refused to identify the hypnotherapist); ground 20 (improper show-up and voice
20 identifications under hypnosis); ground 47 (exclusionary rule violations); grounds 19, 22, and 23 (*Brady*
21 violations); grounds 18 and 46 (*Miranda* violations); grounds 21, 22 and 53 (presentation of false
22 evidence); grounds 21 and 22 (argument of false hypnosis testimony); grounds 27, 29, 46, 47, 49, 51 and
23 52 (judicial misconduct); and ground 46 (trial court erred in admitting unlawfully obtained statements and
24 tampered with evidence). These portions of these claims for relief are **DISMISSED** as procedurally
25 barred.

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1 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #25) is **GRANTED**
2 as to ground 2. Ground 2 is **DISMISSED** as procedurally barred.

3 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #25) is **GRANTED**
4 as to grounds 55, 64, 66, 67, 71, 78, 79, 82, 83, and 90. These grounds for relief are **DISMISSED** as
5 procedurally barred.

6 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (docket #25) is **GRANTED**
7 as to the following portions of the following grounds for relief: ground 60 (trial court improperly allowed
8 the state to create a false impression of the evidence); ground 62 (trial court gave improper and erroneous
9 jury instructions); ground 76 (trial court failed to give several jury instructions); ground 97 (trial court
10 gave improper and erroneous jury instructions); and ground 99 (trial court allowed prosecutorial
11 misconduct); ground 57 (police misconduct, bad faith); ground 68 (police misconduct, bad faith); ground
12 70 (trial court biased and committed misconduct); and ground 86 (failure to investigate assaults on
13 petitioner). These portions of these grounds for relief are **DISMISSED** as procedurally barred.

14 **IT IS FURTHER ORDERED** that petitioner's motion for a stay for exhaustion of claims is
15 **DENIED**. (Docket #42.)

16 **IT IS FURTHER ORDERED** that petitioner's motion for appointment of counsel (docket #45)
17 is **DENIED** for the reasons previously stated in the court's order of September 2, 2009 (docket #22).

18 **IT IS FURTHER ORDERED** that petitioner's motion for discovery is **DENIED**. (Docket #46.)

19 **IT IS FURTHER ORDERED** that petitioner's motion to commute and restructure sentences
20 is **DENIED** as without legal basis. No such separate remedy exists within a petition for writ of habeas
21 corpus. (Docket #49.)

22 **IT IS FURTHER ORDERED** that petitioner's motion for an evidentiary hearing is **DENIED**.
23 (Docket #50.)

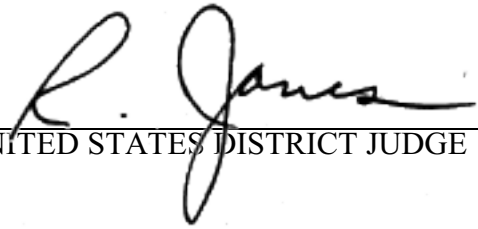
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1 **IT IS FURTHER ORDERED** that respondents **SHALL FILE** an answer to the remaining
2 grounds for relief, or portions thereof, within thirty (30) days of the date of service of this action.
3 Petitioner may file a reply within thirty (30) days thereafter.

4 DATED this 20th day of September, 2010.

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9 UNITED STATES DISTRICT JUDGE
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